Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1271

STATE OF NORTH CAROLINA,
Petitioner

v.

LLOYD C. ASHE
and
HILLIARD P. ASHE

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

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INDEX

Opinion Below 1

Jurisdiction 1

Question Presented 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Reasons Why the Writ Should Issue:

(1) THE FOURTH CIRCUIT'S OPINION PROVIDES AN OPPORTUNITY FOR THE SUPREME COURT TO ANSWER THE UNRESOLVED QUESTION OF WHETHER THERE IS A CONSTITUTIONAL RIGHT TO ALLOCUTION AND TO RESOLVE A CONFLICT ON THE ISSUE BETWEEN THE CIRCUITS 4

Conclusion 6

APPENDICES

A. Order of the United States Court of Appeals for the Fourth Circuit 7

TABLE OF CASES

Haines v. Kerner, 404 U.S. 519 (1972) 5

Hill v. United States, 368 U.S. 424 (1961) 4, 5

Lunz v. Henderson, 533 F2d 1322 (2 Cir. 1966) 5

Martin v. United States, 309 F2d 81 (10 Cir. 1962) 5

United States *ex rel* Darrah v. Brierly, 415 F2d 9 (3 Cir. 1969) 5

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STATE OF NORTH CAROLINA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, the State of North Carolina, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of Lloyd C. Ashe and Hilliard P. Ashe v. State of North Carolina and Cherokee County, Murphy, North Carolina, No. 78-6093, filed November 17, 1978.

OPINION BELOW

The opinion of the United States Court of Appeals is not yet reported but is printed as Appendix A to this petition (pp 7-11 post).

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254(1) within ninety days of November 17, 1978, the date of entry of the order to be reviewed.

QUESTION PRESENTED

DOES A CONVICTED PERSON HAVE CONSTITUTIONAL RIGHT TO ALLOCUTION PRIOR TO SENTENCING?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment, the Fourteenth Amendment, and 28 USC 2254.

STATEMENT OF THE CASE

Lloyd and Hilliard Ashe are prisoners of the State of North Carolina convicted at the October 1975 Term of Superior Court for Cherokee County, Honorable Lacy Thornburg, Judge Presiding, at which time they were represented by Franklin R. Plummer, Esquire, court appointed counsel. Lloyd Ashe entered pleas of not guilty in cases number 75 CR 2348 in which he was charged with safe robbery, and 75 CR 2351 in which he was charged with larceny by breaking and entering. Hilliard Ashe entered pleas of not guilty in cases number 75 CR 2353 in which he was charged with safe robbery and 75 CR 2352 in which he was charged with larceny by breaking and entering. Upon these pleas, they were tried by jury before whom Hilliard but not Lloyd testified, and were convicted with each receiving a sentence of twenty years imprisonment for the safe robbery offense to be followed by a ten year sentence for the larceny offense. They appealed their convictions to the North Carolina Court of Appeals which court, in an opinion filed 7 July 1976 and reported at 30 N.C.App. 74 226 S.E. 2d 398, found no error. On 1 September 1976, the North Carolina Supreme Court declined issue a writ of certiorari, 290 N.C. 664 228 S.E. 2d 455.

On or about November 10, 1976, Lloyd and Hilliard Ashe applied to the United States District Court for the Western District of North Carolina for a writ of habeas corpus. The application for the writ set out thirteen alleged denials of constitutional rights in conclusory form. One of these read "7. The trial judge was prejudice [sic]. See petition for post conviction and denial attached." Paragraph 10 of the post conviction petition read:

> "10. That the trial judge, Lacy H. Thornburg, showed prejudice by denying petitioners the right to speak on their own behalf before sentencing them. That petitioners asked their attorney if they could talk to the judge on their own behalf before he passed sentence and their attorney told petitioners that the judge said they could not talk to him at all and if they tried to talk to him that they would be held in contempt of court and petitioners did not have a chance to speak on their own behalf."

The trial transcript showed little with regard to the sentencing—only the imposition of the sentences, preceded by an offer of evidence from the State which Judge Thornburg struck as irrelevant. No arguments by counsel, if any were made, were taken down. The United States District Judge ruling on the application, Honorable Woodrow W. Jones, dismissed it adjudicating the above contention as follows:

> "Petitioners also contend that the trial judge was prejudiced against them because he did not allow them to address the court personally and that the trial judge denied each of petitioners' motions. Petitioners were not entitled as a matter of constitutional right to allocution and the trial judge's refusal to extend the privilege of allocution was discretionary, *Hill* v. *United States*, 368 U.S. 424 (1962), *United States* v. *Bebik*, 302 F.2d 335 (4th Cir. 1962) and there is no such right under state law. . . . The trial transcript reveals that the trial judge conducted the petitioners' trial in a fair and impartial and courteous manner; that he did not in any way demonstrate to the jury a dislike or contempt for petitioners or for the petitioners' counsel. . ."

On appeal, however, the United States Court of Appeals for the Fourth Circuit reversed, treating petitioners' application as if they had alleged this denial as itself a violation of a constitutional right rather than evidence of a prejudiced judge, and holding that there was a constitutional right to allocution if desired.

REASONS WHY THE WRIT SHOULD ISSUE

THE FOURTH CIRCUIT'S OPINION PROVIDES AN OPPORTUNITY FOR THE SUPREME COURT TO ANSWER THE UNRESOLVED QUESTION OF WHETHER THERE IS A CONSTITUTIONAL RIGHT TO ALLOCUTION AND TO RESOLVE A CONFLICT ON THE ISSUE BETWEEN THE CIRCUITS.

In *Hill* v. *United States*, 368 U.S. 424 (1961), this Honorable Court left open the question of whether or not denying an accused the opportunity to speak on his sentencing violated his constitutional rights, id at 422. This case provides an opportunity for the court to answer this question. Although at common law, there was a right to such allocution, *Hill* v. *United States*, supra, there was no expression of it in the United States Constitution. Therefore, any entitlement must be found in the prohibition against depriving a person of his liberty without due process of law. The extent this prohibition is gauged by whether or not an act is arbitrary, capricious or whether it deprives an accused of fundamentally fair trial, see e.g. *Lisenba* v. *California*, 314 U.S. 219 (1941). Neither exists in this case for like *Hill*'s case, it is not "suggested that in imposing the sentence the . . . judge was either misinformed or uninformed as to any relevant circumstances." Instead, all that is alleged is that at sometime during the trial the Ashe brothers wanted to address the trial judge before sentencing, were informed that they would be held in contempt if they did, and impliedly did not speak. There is no allegation that counsel did not impart the information desired to the judge on their behalf to the extent that it was relevant.

The above leads to the flaw in the Fourth Circuit's decision—that even if what petitioners say is true, the Constitution otherwise requires fair and adequate sentencing procedures through the mechanisms of assistance of counsel and prohibition on using misinformation in sentencing a defendant. This makes the right to allocution a sterile one, a fact impliedly recognized by the Fourth Circuit in this case when it held:

> "because of our view of the defendant's right, upon request, to speak in his own behalf, we remand the case to the District Court to determine whether petitioners did in fact make such a request which was denied. If the District Court finds such a request was made, it should also explore what the petitioners wished to say at their sentencing. Should this information prove to be irrelevant or cumulative in view of the statements by their attorney at sentencing, the denial of their right to speak may be found to be harmless error." (p 10 post)

It is obvious from this that any time this new found right is breached it will likely be harmless error and in the cases in which it is not, the constitution would have been otherwise violated.

Due to the Fourth Circuit's decision, a conflict now exists between it and the Second and Tenth Circuits. In *Lunz* v. *Henderson*, 533 F.2d 1322 (2nd Cir. 1966) the former held that specifically silencing a defendant did not violate his rights where the judge disbelieved the defendant and his lawyer had spoken for him with regard to the matter of the sentencing. In *Martin* v. *United States*, 309 F.2d 81 (10th Cir. 1962), the latter held that an express rejection of a petitioner's right to speak is not sufficient to take a case outside of the decision in *Hill* v. *United States, supra*, i.e. sufficient to impose a constitutional right to allocution, where it was not shown that anything to be said would have affected the sentence imposed. This is the precise situation in this case insofar as the pleadings are concerned. Also, in *United States ex rel Darrah* v. *Brierly*, 415 F.2d 9 (3rd Cir. 1969), the Third Circuit upheld a District Court holding reported at 290 F.Supp. 960 (1968), which specifically ruled that there was no constitutional right to allocution, although this particular ruling is not discussed in the circuit court opinion.

Petitioner State of North Carolina recognizes that this case involves a *pro se* petition, one which is entitled to more leeway in terms of judicial help than a lawyer—drawn one, *Haines* v. *Kerner*, 404 U.S. 519 (1972). However, even where an uncontroverted, rather than a disputed, right is alleged by a prisoner, it has never been suggested that an allegation of harm is indispensible. In *Haines* itself, the court noted "[p]etitioner's *pro se*

complaint included general allegations of physical injuries suffered while in disciplinary confinement and denial of due process in the steps leading to that confinement". Therefore, this parallel should have caused the Court of Appeals either to reject the Ashes' allegation as not showing a constitutional right or should have caused it not to adjudicate the issue due to a lack of case or controversy, rather than ruling in their favor.

CONCLUSION

In the light of the foregoing, this Honorable Court should allow this petition so that it may declare the law on this important matter, resolve the conflicts in the Circuit, and correct the erroneous ruling of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

RUFUS L. EDMISTEN
ATTORNEY GENERAL

Richard N. League
Assistant Attorney General

APPENDIX A

United States Court of Appeals

For the Fourth Circuit

No. 78-6093

LLOYD C. ASHE and
HILLIARD P. ASHE,
Appellants,

v.

STATE OF NORTH CAROLINA,
and CHEROKEE COUNTY, MURPHY,
NORTH CAROLINA,
Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Woodrow W. Jones, Chief Judge.

Argued October 4, 1978 Decided November 17, 1978

Before WINTER, BUTZNER and RUSSELL, Circuit Judges.

C. Frank Goldsmith, Jr. (Story, Hunter & Goldsmith on brief) for Appellant; Richard N. League, Assistant Attorney General (Rufus L. Edmisten, Attorney General of North Carolina on brief) for Appellees.

WINTER, Circuit Judge:

In October, 1975, Lloyd C. Ashe and Hilliard P. Ashe were convicted by a jury in the Superior Court of Cherokee County, North Carolina of safecracking and larceny by breaking and en-

tering. After unsuccessful direct appeal and state post-conviction attack, they sought from the district court, but were denied, a federal writ of habeas corpus. We permitted this appeal to consider their claims that they were affirmatively denied the opportunity to address the sentencing court and that a potentially biased juror was allowed to sit on the jury panel. Since both allegations, if true, may establish a denial of due process of law, we vacate the dismissal of the petition for the writ and remand the case for an evidentiary hearing.

I.

Petitioners allege that they sought to address the state trial court prior to the imposition of sentence, but that the judge, through petitioner's attorney, instructed them to remain silent.[1] The district court thought that the allegation was insufficient to warrant relief because, in its view, a defendant has no right of allocution and the trial judge's refusal to extend the privilege is discretionary. Petitioners contend that refusal of a defendant's request to speak to the sentencing court constitutes a denial of due process under the fourteenth amendment, and we agree.

In interpreting Rule 32(a) of the Federal Rules of Criminal Procedure, which requires federal courts before imposing sentence to address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment, the Supreme Court said that it is not enough that defense counsel has an opportunity to speak at sentencing; the defendant must be given this right personally. *Green* v. *United States*, 365 U.S. 301 (1961). Writing for the Court, Justice Frankfurter reasoned that "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Id.* at 304. Failure to afford a defendant the opportunity to speak on his behalf was construed, therefore, as a violation of Rule 32(a).

[1] Petitioners allege, in addition, that their attorney informed them that, if they attempted to speak to the trial judge, the judge would hold them in contempt. It is unclear from petitioners' allegation whether the judge or the attorney originated the threat. We do rest our decision, therefore, upon this allegation.

Notwithstanding Rule 32(a), a defendant has no constitutional right to be asked if he wishes to address the court before sentencing. *Hill* v. *United States*, 368 U.S. 424, 428 (1962). As a result, any claim that the sentencing judge failed to extend such an invitation must be raised on direct appeal and not be collateral attack. *Id.* at 426. *Hill*, however, did not decide the question of whether habeas relief would be available in the context of "aggravating circumstances"—specifically, where the defendant was affirmatively denied the opportunity to speak or where the district judge was either misinformed or uninformed as to any relevant circumstances. *Id.* at 429.

Since *Hill*, the Supreme Court has not had occasion to determine whether silencing a defendant who wishes to speak to his sentencing would be constitutional error. *See McGautha* v. *California*, 402 U.S. 183, 219 n.22 (1971). We followed *Hill* when the district judge neglected to afford the defendant an opportunity to address the court and there were no "aggravating circumstances". *United States* v. *Bebik*, 302 F.2d 335, 377 (4 Cir. 1962). On the other hand, where the district judge was uninformed as to relevant facts because of his failure to afford the defendant the opportunity to speak, we remanded the habeas proceeding for a hearing. *United States* v. *Taylor*, 303 F.2d 165 (4 Cir. 1962).[2] Affirmative denial of, as opposed to mere failure to grant, the opportunity to speak was upheld by the Second Circuit in *Lunz* v. *Henderson*, 533 F.2d 1322, 1328 (2 Cir.), *cert. denied sub nom. Lunz* v. *Smith*, 429 U.S. 849 (1976). There, however, the Court of Appeals found that the trial judge was justified in thinking that the defendant was attempting to interrupt orderly sentencing proceedings.

We think that when a defendant effectively communicates his desire to the trial judge to speak prior to the imposition of sen-

[2] In *Taylor*, the prisoner alleged that he would have revealed that his guilty plea had been induced by government threats had he been given the opportunity to speak.

tence, it is a denial of due process not to grant the defendant's request.[3] This is not to say that a defendant's right to address the sentencing court is unlimited. The exercise of his right may be limited both as to duration and as to content. He need be given no more than a reasonable time; he need not be heard on irrelevancies or repetitions.

Because of our view of defendant's right, upon request, to speak in his own behalf, we remand the case to the district court to determine whether petitioners in fact made such a request which was denied. If the district court finds that such a request was made, it should also explore what the petitioners wished to say at their sentencing. Should this information prove to be irrelevant or cumulative in view of statements by their attorney at sentencing, the denial of their right to speak may be found to be harmless error. Otherwise, if the request was made and denied, petitioners' sentences must be vacated, and they should be resentenced in a proceeding which allows them the opportunity to speak in their own behalf.

II.

Petitioners alleged, in addition, that a potentially biased juror was allowed to serve on the jury panel, contrary to their due process right to trial by an impartial jury. This juror, they assert, was related by marriage to one state's witness and by ties of friendship to another. The juror was not presented in the selection process until after petitioners' peremptory challenges were exhausted and the trial court declined to grant their challenge for cause.

[3] Our conclusion is strengthened by the post-*Hill* decisions of *Mempa* v. *Rhay*, 389 U.S. 128 (1967) that sentencing is a critical stage of a criminal proceeding to which the sixth amendment right of counsel attaches, and *Faretta* v. *California*, 422 U.S. 806 (1975), that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. Additionally, it is established that a defendant has a constitutional right to testify in his own behalf. *Harris* v. *New York*, 401 U.S. 222 (1971). To the extent that a defendant seeks to advance legal arguments or factual matters bearing upon the sentence which should be imposed on him, these cases seem to recognize that right.

Since timely objection to the impanelling of the juror was made only by petitioners' codefendant, the issue immediately arises as to whether the claim is barred by the doctrine of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). It is also unclear whether the juror's alleged relationship with two state's witnesses was of constitutional dimension, *see Irvin* v. *Dowd*, 366 U.S. 717 (1961), and if so, whether, in view of the nature and degree of importance of the testimony of the witnesses, the juror's presence on the panel constituted harmless error.

Until one crucial fact is established, however, we need not consider any of these questions. It appears from certified copies of the jury list and jury worksheet of the state trial court that the juror in question was excused prior to the commencement of the trial. These documents would be dispositive of the issue if it were not for the indication in the transcript of the trial that the jury was impanelled immediately after the codefendant's challenge to the suspect juror was denied. We therefore remand this aspect of the case to the district court for a determination of the facts. Certainly the juror herself, if she can be found, should remember if she took part or not. If the district court finds that the challenged juror did not serve, this will resolve the issue. If the district court finds that the juror did serve, it will address and decide the other issues that we have identified.

REVERSED AND REMANDED.